

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

CA06-156

December 13, 2006

WILLIAM F. WARREN

APPELLANT

v.

H & L POULTRY, LLC; SECURITY
INSURANCE COMPANY OF HARTFORD;
COMMERCE & INDUSTRY INSURANCE
CO.

APPELLEES

A P P E A L F R O M T H E
W O R K E R S ' C O M P E N S A T I O N
C O M M I S S I O N
[F209440]

AFFIRMED ON CROSS-APPEAL;
REVERSED and REMANDED ON DIRECT
APPEAL

Appellant William Warren challenges the decision of the Arkansas Workers' Compensation Commission denying him benefits. He alleges that the Commission erred in finding that his temporary disability should only commence after his termination until unemployment benefits commenced, when appellant's delay in healing was caused by a third party. We find merit to his argument and reverse and remand for an award of benefits. Cross-appellant/appellee Security Insurance contends that the subsequent reported injury, whether it occurred April 25, 2002 or 2003, was a new injury or aggravation which occurred after it was no longer the carrier of the insurance. Appellee/Cross-appellee Commerce & Industry Insurance Co., asserts that it is a recurrence of the original injury that occurred while appellee Security was on the risk, or a preexisting condition.

Appellant was employed primarily as a wing-cutter, an indisputably rapid and repetitive job, for appellee H & L Poultry, LLC, a poultry- processing plant. Appellant testified that he has a degree

in criminal justice and that he had previously worked for the prison system for about sixteen to eighteen years and then for the Department of Human Services for almost ten years. After experiencing what he described as “burn-out” with his previous jobs, appellant went to work for H & L Poultry and had been employed there for approximately one and half years before his admittedly compensable injury suffered on January 25, 2002.

The admittedly compensable injury, for which appellees paid benefits, was the carpal tunnel injury to the right wrist. After three or four months on the job, appellant began to experience stiffness, tingling, swelling, and aching in his hands, particularly at night. He explained that he had not previously experienced these problems. The pain led to sleeplessness. He also described swelling and the pain associated with the swelling for which he would take aspirin.

Dr. Kenneth Purvis initially saw appellant and administered steroid injections. Eventually, appellant was referred to a specialist, Dr. Michael Moore, and complained to Dr. Moore that he was suffering pain in the left wrist as well as the right. Dr. Moore ordered a nerve conduction and EMG study, and found appellant’s problems to be consistent with a moderate to severe *bilateral* carpal tunnel syndrome and a right de Quervain’s syndrome. On April 3, 2002, Dr. Moore recommended carpal tunnel surgery for the left wrist. The right wrist was improving with injection treatment. Dr. Moore also limited appellant’s work to light duty to resume April 8, 2002, with no pushing, pulling, or lifting greater than ten pounds using both hands, and instructed that appellant should avoid work which requires gripping or repetitive activity.

However, on April 17, 2002, Dr. Moore opined in a letter to appellee carrier Security Insurance that appellant’s left carpal tunnel and the degenerative changes in the fingers revealed by

the bone scan were not related to the work injury which occurred on January 25, 2002. Paperwork contained in the file noted that appellant reported another injury, an injury specific to the left wrist, on April 25, 2002. Appellant testified that although the date 2002 was identified as the date of the subsequent injury, he believed that the reported second injury should have been identified as 2003, not 2002.

Records indicated that the appellant had been placed on light duty following his surgery and, although he was found to have reached maximum medical improvement on the right wrist injury on March 4, 2003, by Dr. Moore, he was still ordered to remain on light duty due to his left carpal tunnel syndrome. Dr. Moore issued no impairment rating at that time, but opined on March 25, 2003, that it was difficult to determine an impairment following the carpal tunnel surgery without a follow-up study. Nevertheless, he stated that he would determine an impairment after such a study based upon the appropriate AMA Guide to the Evaluation of Permanent Impairment.

In that same letter, after appellant's injuries to his left hand had been denied coverage, Dr. Moore wrote that the repetitive nature of the wing-cutter duties could aggravate or precipitate symptoms associated with bilateral carpal tunnel syndrome. However, in response to a letter stating that the work activity was limited to two hours, Dr. Moore related that it was unlikely this limited activity would be the primary cause of a left carpal tunnel syndrome. This explanation was consistent with appellant's insistence that the second reported injury actually occurred in 2003, rather than 2002, regardless of the date on the form.

Additionally, and despite Dr. Moore's opinion in the April 8, 2003, letter, Dr. Moore stated that based upon additional information provided by the case manager of Concentra Managed Care,

Inc., it was his opinion that the limited work activity would be the primary cause of the left carpal tunnel syndrome and that the repetitive nature of the work, including lifting and gripping could exacerbate or precipitate symptoms associated with carpal tunnel syndrome. Given that appellant reported no hobbies or other activities that required strenuous use of his hand, the repetitive work activities would be the major cause of his symptoms. The letter opinion also indicates that if Dr. Moore had understood the nature of appellant's work to begin with, he would have found appellant's work to be the cause of his injuries to the left, or an aggravation thereof, when he initially saw appellant.

The medical records contained in the file make no mention of a shoulder injury; however, appellant testified that after the insurance company denied coverage for the problems associated with his left wrist, his problems worsened, and the pain began to radiate up into his shoulder as he continued working. Appellant testified that his employment with H & L Poultry was terminated on May 5, 2003, for excessive absences for doctors' appointments. He also testified that he then applied for, and received, unemployment benefits for a period of time.

Appellant further explained that he still has problems with his left shoulder and wrist. He stated that he continues to experience swelling and tingling and a loss of strength. He has difficulty picking up items, such as pieces of paper, and opening bottles. He no longer has the same grip strength, he is in pain while at rest, and typing is painful for him. At the time of the hearing, appellant was still not working and did not believe that he could return to the same type employment he was doing for H & L Poultry.

On appeal, appellee/cross-appellant Security Insurance contends that the subsequent reported injury, whether it occurred April 25, 2002 or 2003, was a new injury or aggravation that occurred after it was no longer the carrier of the insurance. Appellee/cross-appellee Commerce & Industry Insurance Co. asserts that it is a recurrence of the original injury that occurred while appellee Security was on the risk, or a preexisting condition.

A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Id.* An aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Id.* A compensable injury must be established by medical evidence supported by objective findings. *Id.* Objective findings are those that cannot come under the voluntary control of the individual. Ark. Code Ann. § 11-9-102(16)(A)(i). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Smith-Blair, supra*. Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes and Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *Smith-Blair, supra*. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings

of fact only those portions of the testimony it deems worthy of belief. *Smith-Blair, supra*. Furthermore, it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, supra*.

From the onset of appellant's reported problems, he complained of pain to the left wrist, which he subsequently reported as extending up his arm to his shoulder, and the nerve conduction and EMG study revealed that appellant suffered from bilateral carpal tunnel syndrome before appellee/cross-appellee Commerce and Industry Insurance came on the risk. It was undisputed that appellant's work duties entailed rapid and repetitive motion.

Regardless of whether the second reported injury date was April 25, 2002 or 2003, the evidence supports the Commission's decision that appellant's problems on the left existed from the January 25, 2002, date of his compensable right wrist injury, and although the problems may be degenerative in nature, they were aggravated or exacerbated by his work and, therefore, are compensable. Any reporting of an injury manifesting on the left after Commerce and Industry Insurance came on the risk amounted to a recurrence of an injury that had existed as of the first report of pain in January of 2002, while Security Insurance was on the risk. Accordingly, we affirm the Commission's allocation of responsibility to appellee/cross-appellant Security Insurance.

We also affirm the Commission's holding that appellant is entitled to temporary total disability benefits for his left wrist injury from January 2002, until his healing period for this injury has ended, which is a date yet to be determined. We affirm the Commission's decision as to the award of benefits. We also affirm the Commission's award of necessary and related medical

expenses appellant has and may incur as a result of his compensable injuries, including an NCV/EMG post-operative study to determine an impairment rating, if any, for appellant's right wrist injury.

However, we must reverse the Commission's finding that appellant was not entitled to temporary total disability while unemployment benefits were being received by appellant. In concluding that appellant was not entitled to temporary total disability while he was receiving unemployment benefits, the Commission cited the case of *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, ___ S.W.3d ___ (Sept. 7, 2005), to support its reasoning in denying benefits during periods when appellant was receiving unemployment. In *Allen Canning*, this court affirmed the Commission's finding that the employee was not totally incapacitated from earning wages after July 18, 2003, based on medical evidence supporting the determination that the healing period had ended. The Commission's decision that the employee was no longer entitled to temporary-total disability benefits was based in part upon the fact that there was no medical evidence indicating that appellee was totally incapacitated from working after July 18, and that after that date, the employee was applying for jobs, holding himself out as able to work.

Appellees extrapolate from that statement in *Allen Canning*, and argue on appeal to this court, that to be eligible for unemployment compensation an applicant certifies that he is ready, willing, and able to work, and that this assertion is not compatible with a claim of total incapacity. They urge us to accept the premise that an employee who asserts in the employment security forum that he is capable of working is precluded from asserting to the Workers' Compensation Commission that he is not capable of working. However, our legislature addressed this situation for an injured employee whose claim is controverted. Arkansas Code Annotated § 11-9-506(b)

clearly states that if a claim for temporary total disability is controverted, and is later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefit.

Unlike *Allen Canning*, in the present case no medical evidence supports the conclusion that appellant had reached the end of his healing period. We do not agree that *Allen Canning* stands for the proposition that an employee is precluded from asserting a claim for unemployment benefits during the pendency of a controverted worker's compensation claim. Such an interpretation would render meaningless our statute that specifically allows temporary total disability benefits when a claim is controverted. Therefore, we reverse for the Commission to first determine the end of appellant's healing period. After that determination is made, then the Commission can calculate the extent to which the temporary total disability benefits otherwise payable exceed the unemployment benefits awarded in accordance with Ark. Code. Ann. § 11-9-506(b).

Reversed and remanded on direct appeal; affirmed on cross-appeal.

HART and VAUGHT, JJ., agree.